

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEVEN J. GEISENHOFF, et al.,
Plaintiffs,

v.

PEND OREILLE COUNTY, et al.,
Defendants.

NO: 12-CV-0639-TOR

ORDER GRANTING MOTION TO
SUBSTITUTE PARTY

BEFORE THE COURT are (1) a motion filed by the United States to substitute itself as a party for Defendant Andrew Garry (ECF Nos. 2 and 5); and (2) a motion to deny the same filed by Plaintiffs, the Geisenhoffs (ECF Nos. 8, 9 and 11). These matters were heard with oral argument on January 18, 2013. Douglas D. Phelps appeared on behalf of Plaintiffs, the Geisenhoffs. Rudolph J. Verschoor appeared on behalf of Defendant Andrew Garry and the United States. Thomas R. Luciani appeared on behalf of all other Defendants. The Court has reviewed the briefing and the record and files herein, and is fully informed.

BACKGROUND

The United States of America has moved to substitute itself as a party-defendant for Defendant Andrew Garry. In support of this motion, the United States has certified pursuant to 28 U.S.C. § 2679(d)(2) that Defendant Garry was acting within the scope of his employment as “a law enforcement officer holding special deputation from the Federal Bureau of Investigation to investigate and enforce Title 18 and Title 21 offenses” when he allegedly detained Patti A. Geisenhoff (hereinafter “Plaintiff”) in a negligent manner on December 4, 2009. ECF No. 3 at 2. Plaintiff opposes the motion on the ground that Defendant Garry, as a tribal police officer with limited authority to investigate federal drug offenses, exceeded the scope of that authority when he detained Plaintiff on a “harassment complaint.”

DISCUSSION

A. Substitution Under 28 U.S.C. § 2679

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (“Westfall Act”) grants federal employees immunity from suit for common law torts committed during the course and scope of their employment. *Osborn v. Haley*, 549 U.S. 225, 229 (2007). “When a federal employee is sued for wrongful

1 or negligent conduct, the Act empowers the Attorney General¹ to certify that the
2 employee ‘was acting within the scope of his office or employment at the time of
3 the incident out of which the claim arose.’” *Id.* at 229-30 (quoting 28 U.S.C.
4 § 2679(d)(2)). The filing of such a certification permits the United States to
5 remove the action from state court and to substitute itself as a defendant in place of
6 the employee. 28 U.S.C. § 2679(d)(2). The certification “is prima facie evidence
7 that [the] employee was acting in the scope of [his] employment at the time of the
8 incident.” *Pauly v. United States Dep’t of Agric.*, 348 F.3d 1143, 1151 (9th Cir.
9 2003) (quotation and citation omitted). “The plaintiff bears the burden of
10 disproving the certification by a preponderance of the evidence.” *Id.*

11 Here, Plaintiff contests the certification filed by the United States Attorney
12 on the ground that Defendant Garry lacked authority to detain her under federal
13 law. Specifically, Plaintiff asserts that Defendant Garry “act[ed] outside the scope
14 of any special [authority]” conferred upon him by the FBI to investigate Title 18 or
15 Title 21 offenses when he detained her to investigate a “harassment complaint.”
16 ECF No. 11-1 at 2-3. Because Defendant Garry exceeded the scope of his federal

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18 ¹ The Attorney General’s certification authority has been formally delegated by the
19 Department of Justice to the sitting United States Attorney in each judicial district.
20 28 C.F.R. § 15.4(a).

1 law enforcement authority, Plaintiff argues, he was not acting within the scope of
2 his federal employment for purposes of the Westfall Act.

3 The main premise of Plaintiff's argument is that Defendant Garry detained
4 her to investigate a "harassment complaint" rather than a federal Title 18 or Title
5 21 offense. This premise, however, is easily disproven. A narrative report of the
6 incident written by Defendant Glenn Blakeslee (appended to Plaintiff's
7 memorandum as "Attachment C") reflects that Defendant Garry detained Plaintiff
8 on suspicion of narcotics trafficking rather than for the purpose of investigating a
9 harassment complaint:

10 Upon arrival I spoke with Tribal Officer Garry. He told me that he
11 was parked at the gas pumps when a small white SUV drove up to
12 him. The female driver [Plaintiff] told him that her male passenger
13 had been harassing her. As she was explaining what was going on,
14 the male stepped out of the vehicle and started trying to dump
15 something out of a white plastic grocery bag into the garbage can.
16 Officer Garry said the substance appeared to be Marijuana. He told
17 the male to stop dumping the marijuana into the trash can. The male
18 complied. The male reached into the vehicle and picked up a black
19 cloth bag and opened it. He showed Officer Garry that it contained a
20 large amount of packaged Marijuana. The female admitted that she
did have Marijuana, but stated they have medical Marijuana
certificates. Officer Garry detained both parties and waited for
Deputies to arrive.

ECF No. 11-1 at 11.

In view of this evidence—which Plaintiff herself submitted—the Court finds
that Plaintiff has failed to satisfy her burden of disproving the United States
Attorney's certification by a preponderance of the evidence. *Pauly*, 348 F.3d at

1 1151. Accordingly, the United States' motion to substitute itself for Defendant
2 Garry is granted. Plaintiff's motion to deny substitution is denied.

3 **B. Scope of Substitution**

4 During the hearing on the United States' motion, the Court sought
5 clarification from Plaintiff as to the precise nature of her claims against Defendant
6 Garry. Specifically, the Court inquired about whether Defendant was being sued
7 in negligence under Washington common law or whether he was being sued for
8 violating Plaintiff's civil rights under (1) the United States Constitution; (2) the
9 Washington Constitution; and/or (3) Washington statutory law. Plaintiff's counsel
10 responded that Plaintiff is only asserting "constitutional claims" against Defendant
11 Garry and that Plaintiff does not intend to pursue common law negligence claims.
12 In view of Plaintiff's counsel's representations, it does not appear that the Westfall
13 Act (or the Federal Tort Claims Act) has any bearing on this case.

14 Nevertheless, in an abundance of caution, the Court will order that the
15 United States be substituted for Defendant Andrew Garry for the *limited purpose*
16 of defending any claims governed by the Federal Tort Claims Act (*i.e.*, common
17 law negligence claims against Defendant Andrew Garry in his personal capacity)
18 that may be alleged in Plaintiff's complaint. This substitution does not extend to
19 any claims against Defendant Garry in his individual capacity arising under (1) 42
20 U.S.C. § 1983; (2) *Bivens v. Six Unknown Named Agents of Fed. Bureau of*

1 *Narcotics*, 403 U.S. 388 (1971); or (3) State of Washington civil rights statutes.

2 As to those claims, Defendant Garry remains as a defendant sued in his individual
3 capacity.

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

5 1. The United States' Motion for Substitution (ECF No. 2) is **GRANTED**.

6 The United States is hereby **SUBSTITUTED** as a party-defendant for
7 Defendant Andrew Garry for the *limited purpose* of defending any claims
8 governed by the Federal Tort Claims Act that may be alleged in
9 Plaintiff's complaint. The case caption shall be amended to reflect the
10 addition of the United States as a party.

11 2. The United States' motion for an expedited hearing (ECF No. 5) is
12 **DENIED**.

13 3. Plaintiff's "Motion Objecting to United States' Motion to Expedite
14 Hearing" (ECF No. 8) and motion for an expedited hearing on the same
15 (ECF No. 9) are **DENIED** as moot.

16 4. Plaintiff's "Motion to Deny Defendant's Motion for Substitution" (ECF
17 No. 11) is **DENIED**.

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1 The District Court Executive is hereby directed to enter this Order, amend
2 the case caption to reflect the addition of the United States as a Defendant, and
3 provide copies to counsel.

4 **DATED** this 18th day of January, 2013.

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6 THOMAS O. RICE
7 United States District Judge
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